IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ROBERT PELTIER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-19a) is reported at 500 F.2d 985.

JURISDICTION

Petitioner's brief adequately sets forth the basis of jurisdiction.

QUESTION PRESENTED

Whether respondent who, like Almeida-Sanchez challenged on constitutional grounds the validity of the search of his automobile throughout the District Court and Court of Appeals' proceedings, should be afforded the same relief as that previously afforded in this Court's decision in *Almeida-Sanchez* 413 U.S. 266?

STATUTES AND REGULATIONS INVOLVED

Petitioner's brief adequately sets forth the statutes and regulations involved with the addition of the following:

Amendment IV to the United States' Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Facts

On February 28, 1973 at about 2:30 a.m., about one and one-half miles north of the Temecula, California stationary immigration checkpoint, which is about 70 air miles north of the Mexican border, border patrol agents Ainscoe and Pfister were sitting in a vehicle parked perpendicular to the flow of traffic on the center median of Highway 395, observing northbound traffic when respondent drove past at a rate of between 50 and 60 miles per hour. (A. 6-7, 12, 16). ("A" refers to Appendix) The weather was inclement that night as it had been raining on and off all that evening. (A. 13).

The officers pursued respondent's vehicle and pulled him over because he appeared to be of Mexican descent. (A. 12). The sole basis for the stop, according to border partol agent Ainscoe, was that they thought respondent looked like he was a Mexican man. (A. 12). After the agents observed that there was nothing in the back seat but some clothes, respondent was asked to step back and open his trunk. At the time of the stop the agents noticed the vehicle had Iowa license plates. (A. 7). On his way back to open the trunk of the vehicle, upon questioning, respondent stated that he was coming from San Diego, and en route to Las Vegas. Respondent, although having dark hair and skin[1]

[1] The district court found that, "... apparently he [Respondent] is of French extraction based upon his name, he does look to be dark skinned and at night, that could easily be the case, that he would appear to be of Mexican descent." (A. 23)

(A. 23), was not of Mexican descent. When respondent was opening the trunk one of the agents noticed a tag on the key like those frequently used in repair shops. (A. 8, 20). Respondent, upon further questioning, stated that the vehicle was his. (A. 8).

Upon opening the trunk, the agents observed a number of suitcases and several plastic trash bags. (A. 8). Although it was stipulated by the government that the trash bags were doubled, that is, one bag inside of the other, and although the bags were opaque in color, without holes and the contraband could not be seen through the bags (A. 14, 17) one agent testified that he believed the bags contained marijuana because of the brick shapes in the bags and thereupon reached into the trunk to feel one of the bags. The agent testified that at this point, he was no longer searching for aliens and as he reached into the trunk he smelled marijuana. (A. 15). He then tore open one of the bags and discovered kilo-shaped bricks that looked like marijuana. (A. 11). Respondent was then transported to the U.S. Border Patrol Office, Temecula, California, and released to special agents for further investigation and incarceration.

District Court

Respondent was indicted on March 7, 1973 in the United States' District Court for the Southern District of California, in a one count indictment charging respondent with knowingly and intentionally possessing with intent to distribute approximately 270 pounds of marijuana in violation of Title 21, U.S.C., Sec. 841(a)(1). (A. 4).

Respondent filed a Motion to Suppress the Evidence on the basis that the search was unreasonable, which was heard and denied on May 12, 1973 (A. 1). On May 17, 1973 respondent, upon waiving trial by jury, submitted the case to the District Court on stipulated facts. (A. 1-2). Respondent's stipulation, that he did knowingly and intentionally possess with intent to distribute the 270 pounds of marijuana discovered in his automobile, was conditional and he expressly reserved the right to test the propriety of the ruling on the motion to suppress, and that the stipulation would be withdrawn in the event respondent was able to obtain a reversal on appeal. (A. 31). The court found respondent guilty of the charge against him. Respondent was sentenced on June 25, 1973, four days after this Court's decision in *Almeida-Sanchez*, to imprisonment for one year and one day, with parole eligibility at such time as may be determined by the Board of Parole pursuant to 18 U.S.C. 4208(a)(2) and to a special parole term of two years as prescribed by 21 U.S.C. 841(b)(1)(B). (A. 37-38).

Court of Appeals

Respondent filed a timely Notice of Appeal on July 3, 1973 to the United States Court of Appeals for the Ninth Circuit. (A. 2). Respondent's case was set with several others for an *en banc* consideration by the thirteen active circuit Court judges. On May 9, 1974, based on well established precedent as reviewed in this Court's decision in *Almeida-Sanchez*, respondent's conviction was reversed, and the case remanded to the

District Court with instructions to suppress the evidence seized in the search of respondent's automobile.

The government conceded therein that the evidence must be suppressed if the rule announced in *Almeida-Sanchez* applies to this case. (Pet. App. 2a).

The opinion of the court which consisted of the concurrence of seven judges, determined that Peltier, who like Almeida-Sanchez objected to the violation of his Fourth Amendment constitutional rights should be afforded the same relief as Almeida-Sanchez, because of "the application of principles enunciated by Chief Justice Taft in 1925 in *Carroll* and consistently adhered to by the Supreme Court thereafter." [not because of a claim of] "benefit of any decision overruling or enlarging 'then-applicable constitutional norms,' *Williams v. United States*, 401 U.S. at 654," (Pet. App. 6a).

The Court held that this Court's ruling in *Almeida-Sanchez* should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced (Pet. App. 1a), (although Peltier's case was not yet on appeal at that time in that his judgment of conviction was not entered until four days after this Court's decision in *Almeida-Sanchez*). (A. 2).

The Court citing *Milton v. Wainwright*, 407 U.S. 371, 381-82, n. 2 (1972) (dissenting opinion of Mr. Justice Stewart) determined that the test established in *Linkletter v. Walker*, 381 U.S. 618 at 629 and its successors for determining whether a *new constitutional* doctrine should be applied retroactively or prospectively, should not be applied to *Almeida-Sanchez* because it did not establish a *new constitutional* doctrine, (emphasis added) (Pet. App. 2a-3a) but only

that "it reaffirmed well-established Fourth Amendment standards dating back to *Weeks v. United States*, 232 U.S. 383 (1914), and *Carroll v. United States*, 267 U.S. 132 (1925)." (Pet. App. 4a).

The *en banc* Court of Appeals upon reviewing most of the major decisions of this Court on the issue of retroactivity determined that *Almeida-Sanchez* did not meet the first test for determining whether a decision of this Court establishes a new constitutional rule because it did not 'overrule clear past precedent'. (Pet. App. 4a-5a).

The Court further determined that neither was the second test met because *Almeida-Sanchez* did not disturb a practice long accepted and widely relied upon. (Pet. App. 3a-4a). This was justified, as the Court explained, because "it [the Government] had cited only one of our opinions, prior to our overruled decision in *Almeida-Sanchez*, holding that government agents on roving patrol can stop and search automobiles without either probable cause or warrant. *United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970)" (Pet. App. 4a). The Court further concluded that all of its other pre-*Almeida-Sanchez* decisions upholding roving-patrol searches away from the border involved stops which were predicated upon: (a) probable cause to believe that the automobile stopped was carrying illegal aliens or contraband,[2] or (b) a reasonable certainty that any contraband which might be found in or on the vehicle

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[2]See, *e.g.*, *United States v. Ardle*, 435 F.2d 861 (9th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *cf. United States v. Kandlis*; 432 F.2d 132 (9th Cir. 1970).

at the time of the search was aboard the vehicle at the time it entered the United States,[3] or (c) a reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who has just crossed the border illegally.[4] (Pet. App. 5a)

The Court upon a review of the applicable statutes and regulations involved stated, "The government fares no better in its alternate claim that it was relying . . . upon the literal command of Congress and a regulation authorizing such searches." (Pet. App. 5a). The majority concluded that ". . .unless the search qualifies as a border search, the statute should not be read, as this Court has read it, to dispense with the requirement of probable cause as well as the requirement of a warrant." (Pet. App. 6a).

The dissent in the Circuit Court in *Peltier*, consisting of six judges, took the contrary approach and concluded that this Court's decision in *Almeida-Sanchez* did constitute a new rule. Judge Wallace in his dissent

[3]See, *e.g.*, *Alexander v. United States*, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

[4]See, *e.g.*, *United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). The Court, by way of footnote (Pet. App. 4a n. 3), conceded that a number of prior decisions contained some dicta from which it might be inferred that they would uphold roving patrol searches as long as they were within the 100-mile area defined by government regulation 8 C.F.R. § 287.1. See, *e.g.*, *Duprez v. United States*, 435 F.2d 1276, 1277 (9th Cir. 1970); *Fumagalli v. United States*, 429 F.2d 1011, 1013 (9th Cir. 1970); *United States v. Elder*, 425 F.2d 1002, 1004 (9th Cir. 1970), *cert denied* 414 U.S. 869 (1974); *Barba-Reyes v. United States*, 387 F.2d 91 (9th Cir. 1967); *Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963); *Contreras v. United States*, 291 F.2d 63 (9th Cir. 1961).

held that a decision could overrule clear past precedent even though it did not require the Supreme Court to reverse one of its prior decisions. (Pet. App. 9a).

As evidence that *Almeida-Sanchez* overruled 'clear past precedent,' he cited *United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969); and *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

These cases, however, upon review, appear to be inapplicable.[5]

The dissent went on to conclude on the authority of its decision in *United States v. Bowen*, that the identical statute was held to be clear past precedent, and that on the foregoing, based on prior statutory and case law, *Almeida-Sanchez* overruled clear past precedent. (Pet. App. 10a).

The dissenting judges also felt that the second alternative of the test was met in that "The cases, whether or not the language is dicta, are important because they demonstrate a long accepted practice that has been widely relied upon." (Pet. App. 11a).[6]

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[5] *United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970), unlike *Almeida-Sanchez* or *Peltier*, involved at least a reasonable suspicion. *Roa-Rodriguez v. United States*, held that contraband found in a jacket located in the trunk of a vehicle stopped by a roving border patrol must be suppressed as it exceeded the agent's authority to search for illegal aliens. *United States v. McDaniel*, unlike *Almeida-Sanchez* or *Peltier* involved a stop and search at a permanent immigration checkpoint.

[6] It is submitted by respondent that this recognition that the prior case law referred to is dicta substantially weakens the dissent's position that *Almeida-Sanchez* overruled "clear past precedent" as established by Circuit Court decisions.

The dissent, citing this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), felt that "[U]nder the *Chevron Oil* formulation of the test, *Almeida-Sanchez* clearly constitutes a new rule[,]" because this issue has not previously been presented to the Supreme Court, making it by definition ". . . an issue of first impression" before that Court. Second, the resolution of an issue that would invalidate immigration stops and searches was not foreshadowed."[7] (Pet. App. 10a).

The dissent, finding that neither alternative of the test had been met, held that a new constitutional rule was stated in *Almeida-Sanchez*. This being the case retroactivity should be judged by the *Stovall* test. (Pet. App. 12a). That test looked to (a) the purpose to be served by the new standards, (b) the extent of reliance by law-enforcement officials on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. See *Stovall v. Denno*, 388 U.S. 293, 297 (1967). (Pet. App. 2a).

The dissent concluded, ". . . for reasons similar to those stated in Part II of *United States v. Bowen*, ____ F.2d at ____, I would hold that the retroactivity test would require prospective application in this case." (Pet. App. 12a).

The Fifth Circuit in the case of *United States v. Miller*, 492 F.2d 37 and its progeny have followed the

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[7] By applying the dictates to *Chevron Oil* to the present case, the opposite result will, in fact, occur. This Court held, in *Chevron Oil* at 107, that "the most he [respondent] could do was to rely on the law as it then was." In both *Almeida-Sanchez* and *Peltier* following the law as it then was, the searches being without even 'reasonable suspicion' were unreasonable and therefore in violation of the Fourth Amendment.

dissenting approach to the issue of retroactive application of *Almeida-Sanchez*. However, on their reasoning the result in *Peltier* and *Almeida-Sanchez* would be exactly the same had they been heard in the Fifth Circuit. The Fifth Circuit maintains that 'clear past precedent' prior to this Court's decision in *Almeida-Sanchez* required at least a 'reasonable suspicion' under the Fourth Amendment to justify the subsequent search of a vehicle after a stop by a roving patrol.[8] This was lacking in both *Almeida-Sanchez* and *Peltier*.

I.

RESPONDENT WHO, LIKE ALMEIDA-SANCHEZ, CHALLENGED ON CONSTITUTIONAL GROUNDS THE VALIDITY OF THE SEARCH OF HIS AUTOMOBILE THROUGHOUT THE DISTRICT COURT AND COURT OF APPEALS PROCEEDING SHOULD BE AFFORDED THE SAME RELIEF AS THAT PREVIOUSLY AFFORDED IN THIS COURT'S DECISION IN *ALMEIDA-SANCHEZ*.

A. Introduction and Summary.

The Ninth Circuit Court of Appeals concluded that this Court's decision in *Almeida-Sanchez*, by not

[8]See, *United States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974); citing *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972); and *Marsh v. United States*, 344 F.2d 317 at 325 (5th Cir. 1965); See also *United States v. Daly*, 493 F.2d 395 (5th Cir. 1974); *United States v. Owen*, 493 F.2d 463 (5th Cir. 1974); *United States v. Byrd*, 494 F.2d 1284 (5th Cir. 1974) citing *United States v. Storm*, 480 F.2d 701 (5th Cir. 1973); *United States v. Greene*, 496 F.2d 1317 (5th Cir. 1974).

applying a new constitutional rule never reached the question of retroactive or prospective application. It determined that only one of its decisions prior to *Almeida-Sanchez* upheld roving border patrol searches without probable cause, warrant or even reasonable suspicion that contraband or illegal aliens would be found.

The Ninth Circuit in those two cases went so far as to read Section 287(a) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1397(a)(3), literally and without any consideration of Fourth Amendment requirements.

On this basis the Ninth Circuit determined that it had substantially deviated from present constitutional requirements in *Almeida-Sanchez* and that this Court's decision in *Almeida-Sanchez* mandated that the Ninth Circuit conform to constitutional requirements by reading the statute with due regard for Fourth Amendment rights —a concept which is not new in the law. Unlike the Ninth Circuit, however, the Fifth Circuit had never been willing to go that far. They had always maintained that 8 U.S.C. 1357(a)(3) required at least a founded or reasonable suspicion to conduct a search on roving patrol, and that by requiring this they were complying with the Fourth Amendment requirements of reasonableness. Their rationale followed this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). The Fifth Circuit in effect was creating a new exception to the probable cause requirement set out in *Carroll v. United States*, 267 U.S. 132 (1925).

Therefore, when the Fifth Circuit read *Almeida-Sanchez* it was viewed as a new constitutional rule, overruling their alleged clear past precedent which

created the exception to the probable cause requirement found in *Carroll.* The Fifth Circuit felt that because they had always conformed to what they determined was reasonable under the Fourth Amendment, *Almeida-Sanchez* requiring probable cause rather than reasonable suspicion for a search was a new rule. It is submitted that their determination that *Almeida-Sanchez* should not be applied retroactively was made on the basis that none of those prior cases involved the rejection of minimal Fourth Amendment safeguards of the defendants. The Ninth Circuit, however, saw the blatant violation of constitutional rights of the defendants through their failure to recognize even minimal Fourth Amendment dictates, and in the few cases in which this occurred, they recognized the need to rectify the injustice and, therefore, held that *Almeida-Sanchez* should be applied to all similar cases pending on appeal.

It is submitted by respondent that it is not a new doctrine that requires all statutes of the country to be subjugated to the dictates of the Constitution as recognized by the Ninth Circuit in *Peltier.* On that basis the decision in *Peltier* should be affirmed. This Court, however, in light of the Fifth Circuit's pre-*Almeida-Sanchez* minimal Fourth Amendment recognition (which recognition was lacking even in Peltier) is being called upon by petitioner to ultimately determine if the Fifth Circuit's prior actions established a clear past precedent sufficient to make the application of *Almeida-Sanchez* to their actions a new rule. Respondent submits that because his search was conducted without the slightest regard for his Fourth Amendment rights, the issue of new or old rule as discussed by the

Fifth Circuit should not even be reached – as under the Fifth Circuit pre-*Almeida-Sanchez* rationale, the evidence would have been suppressed.

B. To determine if this Court's decision in *Almeida-Sanchez* should be applied prospectively or retroactively it should first be determined whether this Court's determination that it is unlawful for a roving immigration officer to stop and search a vehicle without warrant or probable cause within 100 miles of an international border on the primary justification that the driver appears to be of a particular national origin–*overrules clear past precedent–disrupts a practice long accepted and widely relied upon–or decided an issue of first impression whose resolution was not clearly foreshadowed.*

1. The issue of retroactive versus prospective application of a decision of this Court is not reached unless that decision established a new constitutional rule.

The case of *Linkletter v. Walker, supra*, which involved the complete retroactivity of this Court's decision in *Mapp v. Ohio*, 367 U.S. 643, although the first case to announce that decisions affecting constitutional rules in criminal procedure need not be applied completely retroactively (petitioner sought retroactive application on collateral review), never addressed itself to the criteria of what constitutes a new constitutional rule versus 'correcting an aberration'.

It was without dispute in *Linkletter* that the application of the exclusionary rule to state courts as

announced in *Mapp v. Ohio*, 367 U.S. 643 was a new constitutional rule and therefore raised the issue of retroactive or prospective application.

Since *Linkletter v. Walker, supra*, every case that addressed itself to retroactive versus prospective application involved a *new constitutional rule.*[9] See *Milton v. Wainwright, supra.*

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[9] *Linkletter v. Walker*, 381 U.S. 618 (1965), involved the question of retroactive application of the new rule announced in *Mapp v. Ohio*, 367 U.S. 643 (1961), wherein the exclusionary rule was applied to state courts. *Tehan v. Shott*, 382 U.S. 406 (1966), involved the question of retroactive application of the new rule announced in *Griffin v. California*, 380 U.S. 609 (1965) wherein privilege against self-incrimination was violated by prosecution's adverse comment on defendant's failure to testify. *Johnson v. New Jersey*, 384 U.S. 719 (1966), involved the question of retroactive application of the new rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), wherein in-custody interrogation of defendants was done only with a knowledgeable, intelligent, and voluntary waiver of their constitutional rights. *Stovall v. Denno*, 388 U.S. 293 (1967), involved the question of retroactive application of the new rule announced in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), requiring the presence of counsel at a lineup. *Roberts v. Russell*, 392 U.S. 293 (1968), involved the question of retroactivity of the new rule announced in *Bruton v. United States*, 391 U.S. 123 (1968),wherein co-defendant's right to cross-examination was violated by defendant's confessions at joint trial implicating co-defendant. *Marcusi v. de Forte*, 392 U.S. 364 (1968), involved the *Linkletter* application of the new rule set down in *Mapp v. Ohio, supra*, applying the exclusionary rule to state court proceedings. *De Stefano v. Woods*, 392 U.S. 631 (1968), involved the question of retroactive application of the new rules announced in *Duncan v. Louisiana*, 391 U.S. 145 (1968), requiring an unanimous vote for a guilty verdict, and *Bloom v. Illinois*, 391 U.S. 194 (1968), requiring the right to trial in serious criminal contempt cases. This list is far from exhaustive, but the point is presented that the question of retroactive application is only reached if a new constitutional rule is established.

The case of *Almeida-Sanchez*, *supra*, however, is disputed on that issue and should, therefore, require an analysis of whether it constituted a new rule or merely corrected the aberration of law enforcement officers' illegal conduct.[10]

Reviewing the majority's approach in *Williams v. United States*, 401 U.S. 646, this Court after rejecting retroactive application of *Chimel v. California*, 395 U.S. 752 stated at p. 657, "We would judge the claims in both *Williams* and *Elkanich* by the law prevailing when petitioners were searched."

Using this approach, if the law prevailing at the time of search in *Peltier* did not allow indiscriminate searches and seizures anywhere within 100 miles of the international border on the sole basis that someone appeared to be a Mexican descent, then the retroactivity issue becomes moot, for a new rule would, therefore, not have been stated.

A review of this Court's decision in *Almeida-Sanchez* reveals that it does nothing more than reaffirm the 'law prevailing at the time of the search'.

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[10]"An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision over-rules clear past precedent, *e.g.*, *Linkletter v. Walker*, 381 U.S. 618 (1965); *Desist v. United States*, 394 U.S. 244 (1969); or disrupts a practice long accepted and widely relied upon, *e.g.*, *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Stovall v. Denno*, 388 U.S. 293 (1967); *Cipriano v. City of Houma*, 395 U.S. 701 (1969)." *Milton v. Wainwright*, 407 U.S. 371, 381-381, n.2 (1972). (Dissenting opinion of Mr. Justice Stewart.)

Mr. Justice Stewart, in giving the opinion of this Court, concluded that "in the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of unreasonable searches and seizures." *Almeida-Sanchez v. United States* 413 U.S. 266, 273.

The opinion of this court reviewed the requirements of reasonableness of searches and seizures under the Fourth Amendment before concluding the activity of the Border Patrol agents making roving stops and searches without probable cause or warrant did not come within any presently existing exception from a search warrant, or probable cause and therefore must be disallowed under the long established rule of *Weeks v. United States* 232 U.S. 383, (1914) and *Carroll v. United States* 267 U.S. 132 (1925).

In the present case, like *Almeida-Sanchez*, there did not exist even a "reasonable suspicion" that illegal activity was occurring; on the contrary, in the present case the border patrol agents were acting "on nothing more substantial than inarticulate hunches".[11] This

[11]Under certain well defined circumstances a limited intrusion upon individual freedom may be justified. "And in making that assessment it is imperative that the facts be judges against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? *Cf. Carroll v. United States*, 267 U.S. 132 (1925); *Beck v. Ohio*, 279 U.S. 89, 96-97 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, *e.g., Beck v. Ohio, supra: Rios v. United States*, 364 U.S. 253 (1960), *Henry v. United States*, 361 U.S. 98 (1959)." *Terry v. Ohio*, 932 U.S. 1, 22 (1968).

point was brought out on examination of border patrol agent Charles Ainscoe at Mr. Peltier's hearing on his motion to suppress the evidence (Pet. App. p. 12).

Q. "Was Mr. Peltier's car just picked at random?

A. "No; Mr. Peltier looked to me like a Mexican When he went by, and I chased him down for that reason; I thought he was a Mexican man."[12]

This court in *Almeida-Sanchez* at page 268 specifically reviewed the "reasonable suspicion" requirement for a "stop" and "frisk" street detention situation found in *Terry v. Ohio* whereby a search warrant was not required, and held that it did not apply to the *Almeida-Sanchez* type stops because the "reasonable suspicion" requirement was lacking.

This court further held that the warrantless search of an automobile without probable cause, not at an international border or its functional equivalent, could not be justified by any previous constitutional precedent involving the search of an automobile.[13]

After a review of those decisions this court held "Automobile or no automobile, there must be probable cause for the search."[14]

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[12]Under the facts of the case at bar, even if it is determined that border patrol agents have authority to make a limited stop for the purpose of determining citizenship, once they discovered upon talking to Mr. Peltier and his identifying himself, that he was not an illegal alien, their authority stopped there. Without probable cause, the subsequent search was unlawful and in violation of Peltier's Fourth Amendment rights.

[13]*Almeida-Sanchez v. United States*, 413 U.S. 266 at 269.

[14]*Id.*

The Government's primary justification for its warrantless stop and search of automobiles devoid of probable cause or even reasonable suspicion was based on administrative inspection cases specifically citing *Camara v. Municipal Court*, 387 U.S. 523; *See v. City of Seattle* 387 U.S. 541; *Colonnade Catering Corp. v. United States* 397 U.S. 72; and *United States v. Biswell* 406 U.S. 311. But that justification too was determined not to be on point where this Court stated, while reviewing *Camara, supra*, "yet the court insisted that the inspector obtain either consent or a warrant supported by particular physical and demographic characteristics of the area to be searched".[15] Unlike the inspector in *Camara*, the Border patrolmen in neither *Almeida-Sanchez* nor *Peltier* obtained consent or a warrant supported by anything.

In distinguishing *Almeida-Sanchez* from the type of search conducted in *Colonnade, supra*, and *Biswell, supra*, this Court differentiated a search of anyone's automobile within 100 air miles of the borders, and a business man who voluntarily engages in a federally licensed and regulated enterprise.[16]

As further evidence that *Almeida-Sanchez* did not establish a new evidentiary exclusionary rule but merely restated long recognized constitutional standards, this court concluded at page 272,

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[15] *Id.* at 270.

[16] Id. at 271 "a central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business."

"Since neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case, we are left simply with the statute that purports to authorize automobiles to be stopped and searched, without a warrant and 'within a reasonable distance from any external boundary of the United States'."

Based on the foregoing reasoning this Court ultimately concluded that "In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of unreasonable searches and seizures."[17]

Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez*, after reviewing the government's purported justifications for the search without probable cause or warrant, concluded that "None of the foregoing exceptions to the warrant requirement, then, applies to roving automobile searches in border areas."[18]

Mr. Justice Powell did outline a possible procedure whereby this type of search may be judicially sanctioned through the use of a warrant for an "area search".

However in voting to reverse the conviction of *Almeida-Sanchez* Mr. Justice Powell stated "As no warrant was obtained here, I agree that the judgment must be reversed."[19]

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[17] *Id.* at 273.

[18] *Almeida-Sanchez*, 413 U.S. 266 (Mr. Justice Powell concurring opinion), p. 282.

[19] *Id.* at 285.

Likewise in *Peltier*, 'as no warrant was obtained the judgment must be reversed.'

A review of Mr. Justice White's dissent in *Almeida-Sanchez* fails to lend any credence to the government's claim that *Almeida-Sanchez* set forth a new constitutional rule. Mr. Justice White views the governing standard of the Fourth Amendment to be one of reasonableness.[20] Nowhere in this Court's decision in *Almeida-Sanchez*, the concurring opinion, nor the dissenting opinion is there any discussion of new constitutional rules. The decision is based solely on traditional notions of Fourth Amendment constitutional rights as established over the past 185 years.

2. Several circuit court decisions cannot elevate illegal governmental practices into constitutional guidelines by quoting dicta under the pretense of '*Clear Past Precedent*.'

This Court, prior to *Almeida-Sanchez*, had never addressed itself to the legality of a roving border search without probable cause or a search warrant. One must, therefore, look to the lower court decisions to determine if *Almeida-Sanchez* overruled clear past precedent.

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[20] "As the Court has reaffirmed today in *Cady v. Dombrowski, post*, p. 433, the governing standard under the Fourth Amendment is reasonableness and in my view, that standard is sufficiently flexible to authorize the search involved in this case." *Almeida-Sanchez v. United States*, 413 U.S. 266, Justice White dissenting p. 289.

As pointed out, *supra*, the first test for determining if a new constitutional rule has been established is whether 'the decision overrules clear past precedent'.[21] With the exception of one decision prior to this Court's decision in *Almeida-Sanchez* the government is unable to establish *any* past precedent of judicial approval of roving, warrantless, searches of automobiles without probable cause.[22] The petitioner does present a number of cases which purportedly establish some authority albeit by way of dicta, for their position, however, a careful consideration of these cases reveals no clear past precedent for roving warrantless searches of automobiles without probable cause.[23] Of all the cases cited in

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[21] See note 10, *supra*.

[22] *United States v. Miranda*, 426 F.2d 383 (9th Cir. 1970). This is the only case directly on point allowing roving border searches without warrant. However, it may be argued here that considering the totality of the circumstances at least a reasonable suspicion existed in this case after the initial stop, unlike *Peltier*.

[23] *United States v. Anderson*, 468 F.2d 1280, involved a stationery border checkpoint and agents had probable cause to search after smelling marijuana and seeing expended marijuana cigarette in ashtray. *United States v. McCormick*, 468 F.2d 68 *certiorari denied*, 410 U.S. 927 involved a stationary border checkpoint and agents had probable cause to search after erratic approach of vehicle and odor of marijuana. *United States v. Wright*, 476 F.2d 1027, involved a roving search where immigration officers had a reasonable suspicion the vehicle contained aliens. *United States v. McDaniel*, 463 F.2d 129, certiorari denied, 413 U.S. 919, involved a stop and search at a stationary border checkpoint, Court held search reasonable in light of all the facts. *United States v. De Leon*, 462 F.2d 170, *certiorari denied*, 414 U.S. 853, involved stop two miles from border and examination of trunk revealed false bottom. *United States v. Aranda*, 457 F.2d 761 involved a stationary border

petitioner's brief for the proposition that prior circuit court decisions have established 'clear past precedent'

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checkpoint where defendants fled after being directed to stop where officers observed the vehicle was hanging low in the back. *United States v. Bird*, 456 F.2d 1023, *certiorari denied*, 413 U.S. 919, involved a stationary border checkpoint. *United States v. Foerster*, 455 F.2d 981, vacated and remanded, 413 U.S. 915 involved a stationary border checkpoint where driver had taken evasive action and drove through checkpoint. *Mienke v. United States*, 452 F.2d 1076 involved a stationary checkpoint. *United States v. Almeida-Sanchez*, 452 F.2d, reversed, 413 U.S. 266. *United States v. Maggard*, 451 F.2d 502 involved a stationary checkpoint where agents had a reasonable suspicion. *United States v. Marin*, 444 F.2d 86 involved a stop 3 miles from the border. *Duprez v. United States* 435 F.2d 1276 involved a stationary border checkpoint where driver had taken evasive action and drove through checkpoint. *Fumagalli v. United States*, 429 F.2d 1011, involved a stationary checkpoint. *United States v. Sanchez-Mata*, 429 F.2d 1391 the nature of the stop cannot be ascertained from the stated facts. *United States v. Avey*, 428 F.2d 1159, *certiorari denied*, 400 U.S. 903 involved a stationary checkpoint and it was determined that custom agents had probable cause to search. *United States v. Miranda*, 426 F.2d 283 is the only case directly on point involving a stop away from the stationary border checkpoint with a subsequent search revealing contraband. *United States v. Elder*, 425 F.2d 1002 involved a vehicle which crossed the international border and because of the surrounding circumstances customs agents had at least a reasonable suspicion that illegal activity may have been accuring. *Roa-Rodriquez v. United States*, 410 F.2d 1206 involved a roving stop and search of a jacket in the trunk of the vehicle which revealed contraband. The Court properly suppressed the evidence. *Valenzuela-Garcia v. United States*, 425 F.2d 1170, involved stop at checkpoint and search of area where alien could not have been hiding. Court suppressed the contraband as the result of an illegal search even though the officer observed the driver to be nervous. *Barba-Reyes v. United States*, 387 F.2d 91 involved a stop at a

only seven cases even involved a roving border search,[24] and out of those seven cases, this court reversed one,[25] two others involved a situation where the immigration officers had at least a 'reasonable suspicion to believe that contraband or illegal aliens were involved,'[26] another decided that the evidence was illegally obtained and must therefore be suppressed (contraband found in jacket pocket in trunk),[27] two cases are distinguishable in that the searches took place within 2-3 miles of the international border,[28] and one case appeared to be

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stationary border checkpoint. *Fernandez v. United States*, 321 F.2d 283 involved stop at stationary border checkpoint and Court held officers had probable cause to search where they smelled marijuana under the hood of the vehicle. *Ramirez v. United States*, 263 F.2d 385 involved a stop at a stationary checkpoint; a search was conducted where defendant was nervous and evasive. *Haerr v. United States*, 240 F.2d 533 involved a stationary checkpoint where defendants evasively drove off after being instructed to pull over to the side of the road, they threw the contraband out of the automobile and there was therefore not even a search. *United States v. King*, 485 F.2d 353 involved a search at a stationary checkpoint.

[24] *United States v. Wright*, 476 F.2d 1027, *cert. denied* 414 U.S. 821 (1974); *United States v. De Leon*, 462 F.2d 170, *cert. denied* 414 U.S. 853 (1973); *United States v. Marin*, 444 F.2d 86; *United States v. Miranda*, 426 F.2d 283; *Roa-Rodriguez v. United States*, 410 F.2d 1206; and *United States v. Almeida-Sanchez*, 452 F.2d, *reversed* 413 U.S. 266; *Unites States v. Miller*, 492 F.2d 37.

[25] *Almeida-Sanchez, supra.*

[26] *United States v. Wright*, 476 F.2d 1027, *cert. denied* 414 U.S. 821 (1974); *United States v. Miller*, 492 F.2d 37.

[27] *Roa-Rodriguez v. United States*, 410 F.2d 1206, *cert. denied*, 414 U.S. 853 (1974).

[28] *United States v. De Leon*, 462 F.2d 170, *cert. denied*, 414 U.S. 853; *United States v. Marin*, 444 F.2d 86.

directly on point.[29]

This array of judicial authority falls far short of 'clear past precedent' especially in light of the fact that there are many more cases addressing themselves to the point that at least a 'reasonable suspicion' existed in sustaining an immigration search even at the stationary checkpoints.[30]

3. Substantial Reliance by Immigration Officers on their erroneous interpretation of a statute does not give their resulting illegal activity constitutional justification.

As pointed out earlier herein, the issue of retroactive versus prospective application of a decision of this court is not reached unless that decision at least "disrupts a practice long accepted and widely relied upon".[31]

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[29] *United States v. Miranda*, 426 F.2d 283.

[30] *United States v. Anderson*, 468 F.2d 1280, search based on probable cause; *United States v. McCormick*, 468 F.2d 68 *cert. denied* 410 U.S. 927, search based on probable cause; *United States v. Wright*, 476 F.2d 1027, *cert. denied* 414 U.S. 821 (1974), search based on reasonable suspicion *United States v. McDaniel*, 463 F.2d 129 *cert. denied*, 413 U.S. 919, search held reasonable in light of all the circumstances. *United States v. Aranda*, 457 F.2d 761, at least reasonable suspicion; *United States v. Foerster*, 455 F.2d 981, vacated and remanded, 413 U.S. 915, at least reasonable suspicion; *Duprez v. United States*, 435 F.2d 1276, at least reasonable suspicion; *United States v. Avey*, 428 F.2d 1159, *cert. denied* 400 U.S. 903 (1971), probable cause; *United States v. Elder*, 425 F.2d 1002, *cert. denied* 414 U.S. 869 (1974) at least reasonable suspicion; *Fernandez v. United States*, 321 F.2d 283, probable cause; *Ramirez v. United States*, 263 F.2d 385, at least reasonable suspicion.

This relaince however must be reasonable under the circumstances to have any consequence in the determination of whether this court's decision states a new constitutional rule.

This point was directly addressed in this Court's decision in *Almeida-Sanchez* at page 272 where Mr. Justice Stewart said, "It is clear of course, that no Act of Congress can authorize a violation of the Constitution." Likewise no erroneous interpretation of an act of Congress should give constitutional justification to the resulting illegal activities.

As pointed out so aptly in Respondent's brief in *United States v. Ortiz*, No. 73-2050 at page 79 "although checkpoints have been operating for years, their lack of legal right to exist was recognized by the nation's chief law enforcement officer . . ." in a letter sent by Attorney General Biddle to the Chairman of the House Committee on Immigration and Naturalization wherein he stated in part:

> "In the enforcement of the immigration laws, it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and the legal right to do so should be conferred by law." H.R. Rep. No. 186, 79th Cong., 2d Sess. (1945), 1946 U.S. Code Cong. Service 1414.

Section 287(a) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C., 1357(a) must be viewed in light of Fourth Amendment requirements of reasonableness.

Viewing the totality of the circumstances it is arguable that the Fourth Amendment may 'reasonably' allow without a warrant, or even a reasonable suspicion

slight intrusion in personal freedom to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[32] It is submitted that no such exception to the reasonable suspicion requirement has yet been established, *see Au Yi Lau v. I & N.S.*, 445 F.2d 217, *infra.* However, in the present case, when immigration officers determined that Peltier was not of Mexican descent and was a citizen of the United States any further detention or search without probable cause or even a reasonable suspicion went far beyond the reasonableness requirement of the Fourth Amendment and such activity is unsupported by any prior authority of this Court, or even clear past precedent established by inferior tribunals. Any reliance on statutory authority by immigration officers for the right to seize and search a vehicle without probable cause, or reasonable suspicion, without warrant, was an unreasonable interpretation of 8 U.S.C. 1357 a(3) and therefore, unjustified in that both the preceding sections of the same statute had been judicially interpreted to include the Fourth Amendment protections.

Immigration and Nationality Act, §287(a), 8 U.S.C. 1357(a)(1) has been held to contain implied limitations consistent with the constitutional principles set forth in the Fourth Amendment. *Au Yi Lau v. United States Immigration and Nat. Serv.*, 445 F.2d 217 required a reasonable suspicion to enable Immigration officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[33] The case of *Yan Sang Kawi v. INS*, 411 F.2d

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[32]8 U.S.C. 1357(a)(1).

[33]Section 287 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 8 U.S.C. 1357(a)(1).

683 read in the requirement of probable cause to arrest an alien pursuant to the Immigration and Nationality Act, § 287(a), 8 U.S.C. 1357(a)(2) reciting the dictates of *Carroll v. United States*, 267 U.S. 132.

It hardly seems reasonable that the government should be required to read subsections 1 and 2 in light of the Fourth Amendment requirements, and then claim that subsection 3 could be reasonably read devoid of any constitutional limitations.

On this basis it is hard to find justification for the activities of the immigration officers in a statute which on its face, without reading in the Fourth Amendment requirements, appears to violate every prior precedent established by this Court relating to the protection of the individual's right to be free of unreasonable search and seizure.

It is also noteworthy that a further reading of the subsection in question (i.e., 1357(a)(3)) permits access to private lands, but not dwellings, only within a distance of twenty-five miles from such external boundary, to prevent the illegal entry of aliens into the United States. It would be illogical to assume that Congress intended to permit major intrusions on Fourth Amendment guarantees up to one hundred miles of the border, (i.e., stopping of a vehicle on open highways and subsequent search, see *Coolidge v. New Hampshire*, 403 U.S. 443), with no safeguards, while prohibiting minor trespasses to lands outside twenty-five miles, unless accompanied by constitutional safeguards. To assume otherwise would be to deny the will of Congress and to reduce the protections of the individual. The public interest in excluding illegal aliens by this means must acknowledgedly be weighed against the rights of

the private citizen, but a search within the literal language of the statute is nonetheless barred if it violates the Fourth Amendment. *Boyd v. United States*, 116 U.S. 616.

Therefore, when read in light of the Fourth Amendment, (which, under all of the circumstances is the only reasonable way of viewing it) the statute does nothing more than give immigration officers authority to conduct a search without a warrant under then existing law as interpreted by *Weeks v. United States*, 232 U.S. 282 (1914), and *Carroll v. United States*, 267 U.S. 132 (1925).

This brings the Court to the point that even if *Almeida-Sanchez* did meet the second test as set out in *Stovall v. Denno, supra*, (disrupts a practice long accepted and widely relied upon) which respondent submits that it does not, such reliance and acceptance was not legally justified.

Simply by virtue of the small number of cases which have addressed themselves to warrantless, roving searches without probable cause, it can be seen that no matter how long the practice has been occurring, there was very little reliance upon it.

On the basis outlined herein there is no jusitification for petitioner's proposition that this Court's decision in *Almeida Sanchez* "disrupts a practice long accepted and widely relied upon".[34]

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[34] *Johnson v. New Jersey*, 384 U.S. 719; *Stovall v. Denno*, 388 U.S. 293; *Cipriano v. City of Houma*, 395 U.S. 701; *Milton v. Wainwright*, 407 U.S. 371, 381-382 n.2 (dissenting opinion of Mr. Justice Stewart).

To hold that *Almeida-Sanchez* states a new evidentiary exclusionary rule based solely on governmental reliance would be to hold that the government can establish legal precedent by its illegal unilateral activities.

4. This Court's decision in *Almeida-Sanchez*, that it is unlawful for a roving immigration officer to stop and search a vehicle without warrant or probable cause, within 100 air miles of an international border on the primary justification that the driver appears to be of a particular national origin, did not *decide an issue of first impression whose resolution was not clearly foreshadowed.*

The recent case of *Chevron Oil Co. v. Huson*, 404 U.S. 97 which is used by petitioner for added justification that *Almeida-Sanchez* decided a new constitutional rule and upon analysis should only be applied prospectively, can be readily distinguished from *Almeida-Sanchez*.

Chevron Oil Co. v. Huson, supra, involved the question of retroactive or prospective application of *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969) which overruled a long line of Circuit Court decisions and held that state law and not admiralty law applied under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331 et. Seq.[35]

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[35] *Chevron Oil Co. v. Huson*, 404 U.S. 97 at 107. "*Rodrique* was not only a case of first impression in this court under the Lands Act, but it also effectively overruled a long line of decison by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applied through the Lands Act. See *e.g., Price Oil Co. v. Snipes*, 293 F.2d 60; *Movible Offshore Co. v. Ousley*, 346 F.2d 870; *Loffland Bros. Co. v. Roberts*, 386 F.2d 540.

This Court, in refusing to give retroactive application to Rodrique, stated of respondent, "The most he could do was to rely on the law as it then was."[36]

Like Huson, Peltier is relying 'on the law as it then was.'

Therefore, if this Court were to view *Almeida-Sanchez* in light of *Rodrique* the result would still be exactly the same.

It is apparent that none of the technical guidelines for prospective or retrospective application as set out in the prior decisions of this Court discussed herein do anything more than reaffirm the fact that *Almeida-Sanchez* establishes no new constitutional rules, but simply rectifies a point of divergent governmental activity which has defied the explanation of legal scholars and law professors in recent years.

C. Applying Mr. Justice White's dissenting opinion in *Almeida-Sanchez* to Peltier, lacking reasonableness, the evidence seized as a result of the search must be suppressed.

Mr. Justice White, in his dissent is *Almeida-Sanchez* after reviewing the facts of *Almeida-Sanchez* and the prior case law on the subject concluded ". . . the governing standard under the Fourth Amendment is reasonableness, and in my view, that standard is sufficiently flexible to authorize the search in this case."[37]

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[36] *Id.*

[37] *Almeida-Sanchez v. United States*, 413 U.S. 266 (Mr. Justice White dissenting opinion) at 289.

The facts in *Peltier* do not comport to the reasonableness standard as set out by Justice White in his dissenting opinion in *Almeida-Sanchez.*

The highway on which Almeida-Sanchez was stopped was "about the only north-south road in California coming from the Mexican border that does not have an established checkpoint." [Because of that,] "it is commonly used to evade check points by both marijuana and alien smugglers."[38] By way of footnote, Mr. Justice White went on to explain, "west of Glamis the prevaling direction of the highway is east-west. At the point of the stop west of Glamis, the highway is only approximately 20 miles north of the border, running parallel to it. . . ."[39] Unlike the stop in *Almeida-Sanchez*, Peltier was not on a highway which, because it lacked a stationary checkpoint, was more commonly used by marijuana and alien smugglers. On the contrary, this road did have a stationary checkpoint.[40]

Unlike the stop in *Almeida-Sanchez*, Peltier was not on a road 20 miles from the Mexican border. On the contrary, Highway 395 is one of only three major roads leading out of the second largest city in California, and Mr. Peltier was more than 70 air miles north of the Mexican border,[41] and over 50 miles north of San

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[38]*Id.* at 286.

[39]*Id.* at 286 n.2.

[40]Appendix, p. 7, Transcript of Hearing on Motion to Suppress. "Q: Now, there is a stationary checkpoint in the Temecula area, is there not;" "A: From time to time, yes."

[41]Id. "Q: And was Mr. Peltier, at the time you saw him, or at the place that you saw him, would he have been north of that checkpoint?" "A: Yes, he would have been north of where the checkpoint normally is . . . ." "THE COURT: How far is that from the border?" "THE WITNESS: The checkpoint is about seventy miles from the border, sir, air miles."

Diego. Highway 395 does not even go to the Mexican border, but terminates in the middle of downtown San Diego. Every person in San Diego wishing to travel to central or northern California inland must take this road. Likewise, every person wishing to take the most direct route to the mid-western United States would travel over this same spot where Peltier was stopped.

In *Almeida-Sanchez* "Petitioner's identification revealed that he was a resident of Mexicali, Mexico, but that he hald a work permit for the United States. Petitioner had come from Mexicali, had picked up the car in Calexico, and was on his way to Blythe to deliver it. He intended to return to Mexicali by bus."[42] By way of footnote, at page 286, Mr. Justice White further reveals, "It appears, see App. 12, 13, that the officers were informed of these facts before initiating any search for aliens and hence before finding any contraband.[43]

Unlike *Almeida-Sanchez*, the immigration officers upon stopping Peltier and prior to the search learned that Peltier was not a resident of Mexico, nor was he coming from Mexico.[44] In fact, upon these observations, Mr. Peltier was in the exact same position as any one of the million plus residents in San Diego County

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[42]*Almeida-Sanchez v. United States*, 413 U.S. 266 (Mr. Justice White dissenting opinion at 286.

[43]*Id.* at 286 n. 3.

[44]Pet. App. p. 8 Transcript of Hearing on Motion to Suppress. "Q: All right. Now, what happened after you asked Mr. Peltier to open the trunk?" "A: He got out of the car; on the way back to the trunk, I asked him where he was coming from. He replied, I believe, San Diego. I saked him where he was going; he said, Las Vegas. . . ."

who at one time or another traveled north on Highway 395.

Mr. Justice White in his dissent in *Almeida-Sanchez* reviewed the decision of *United States v. McDaniel*, 463 F.2d 129 wherein at p. 297 he stated:

> "Judge Goldberg, with Judge Wisdom and Judge Clark, was careful to point out, however, that the authority granted under the statute must still be exercised in a manner consistent with the standards of reasonableness of the Fourth Amendment. 'Once the national frontier has been crossed, the search in question must be reasonable under *all* of its facts, only one of which is the proximity of the search to an international border.'" [Citation omitted.]

Peltier confronts this Court with the very issue presented by Mr. Justice White in his dissent in *Almeida-Sanchez* where at page 299, by way of footnote, he states:

> "The United States does not contend, see Tr. of Oral Arg. 29, and I do not suggest that any search of a vehicle for aliens within 100 miles of the border pursuant to 8 CFR §287.1 would pass constitutional muster...."

Mr. Justice White concluded that "The clear rule of the circuit, is that conveyances may be stopped and examined for aliens without warrant or probable cause *when in all the circumstances it is reasonable to do so.*'[45] (Emphasis added.)

Even if this Court should determine that a causeless stop of a vehicle for the sole purpose of questioning

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[45] *Almeida-Sanchez v. United States*, 413 U.S. 266 (Mr. Justice White dissenting opinion) at 298.

persons in the vehicle concerning their right to be or remain in the United States is not unreasonable under the Fourth Amendment, it is submitted that any search thereafter *without even a reasonable suspicion* that aliens or contraband may be found far exceeds the bounds of reasonableness under the Fourth Amendment to the Constitution of the United States.[46]

Based on the foregoing, following the rationale set out in the dissenting opinion in *Almeida-Sanchez*, the search of Mr. Peltier's trunk, unlike *Almeida-Sanchez*, in light of all of the circumstances, was unreasonable, and therefore in violation of his Fourth Amendment rights and protections.

D. Clear past precedent, prior to this Court's decision in *Peltier* has established that *Almeida-Sanchez* should be applied to all similar cases pending on appeal at the time of this Court's decision in *Almeida-Sanchez*.

This Court in *Peltier* is being asked for the first time whether this Court's decision in *Almeida-Sanchez* should be applied to all similar cases pending on appeal at the time of *Almeida-Sanchez*.

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[46]The government cites *United States v. Miller*, 492 F.2d 37, pending on petition for a writ of certiorari, No. 73-6975, for authority that *Almeida-Sanchez* should not be applied retroactively. However, that case differs substantially from *Peltier* on the facts, in that in Miller the border patrol officers "noticed a strong odor of marihuana" while inspecting the interior of the automobile. *Id.* at 39. This in itself could possibly establish a reasonable suspicion, which was lacking at the time of the search in *Peltier*.

The Fifth,[47] Ninth,[48] and Tenth Circuits[49] have all reviewed this point and they have all come to the same conclusion– cases pending on direct appeal at the time of this Court's decision in *Almeida-Sanchez* will have the evidence suppressed which was the result of a roving border search of a vehicle where the search lacked, a warrant, probable cause or at least a reasonable or founded suspicion that contraband or illegal aliens would be discovered.

Although the three Circuits addressing themselves to the application of *Almeida-Sanchez* to cases pending on appeal come up with different rationales the result as applied to *Peltier* would be exactly the same.

The Ninth Circuit as can be seen from the instant case holds that *Almeida-Sanchez* does not state a new rule as applied to roving border searches, therefore cases pending on appeal must conform to the *Almeida-Sanchez* doctrine.[50]

The Tenth Circuit, like the Ninth, holds that *Almeida-Sanchez*, not stating a new constitutional rule must apply the doctrine to cases pending on direct

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[47]*United States v. Speed*, 497 F.2d 546 (5th Cir. 1974); *United States v. Greene*, 496 F.2d 1317 (5th Cir. 1974); *United States v. McKim*, 487 F.2d 305 (5th Cir. 1973); *United States v. Byrd*, 483 F.2d 1196 (5th Cir. 1973).

[48]*United States v. Ojeda-Rodriguez*, 502 F.2d 560 (9th Cir. 1974); *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1973); *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1973).

[49]*United States v. King*, 485 F.2d 353, 357 (10th Cir. 1973); *United States v. Maddox*, 485 F.2d 361, 363 (10th Cir. 1973).

[50]See also *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1973) cert. granted, 413 U.S. ____

appeal on the date of the decision in *Almeida-Sanchez*. See *United States v. King*, 485 F.2d 353 (10th Cir. 1973) and *United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973).

The Fifth Circuit, although achieving the same result through another means, now contends that *Almeida-Sanchez* declared a new constitutional rule.[51] In the case of *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974) after determining that *Almeida-Sanchez* was a case of first impression in the Supreme Court as set forth in this Court's decision in *Chevron Oil Co. v. Huson, supra*, the Court refused retroactive application. The facts in *Miller*, however, and all other Fifth Circuit roving-patrol cases are determinative of their holding contrary to the cases in the Ninth and Tenth Circuits. *Miller's* conviction was sustained on appeal based on pre-*Almeida-Sanchez* law as applied in the Fifth Circuit. Unlike the Ninth Circuit, the Fifth Circuit has continuously maintained prior to *Almeida-Sanchez*, that a roving-patrol vehicle search must conform to minimal standards of reasonableness as set down in the Fourth Amendment. This point has been reviewed on numerous occasions where the Fifth Circuit Court stated in *United States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974) at 169:

> "This Court has recently determined, however, that the constitutional enlightenment provided by *Almeida-Sanchez* should not be applied to the

[51]The Fifth Circuit originally was in conformance with the Ninth and Tenth in applying *Almeida-Sanchez* retroactively. See *United States v. Byrd*, 483 F.2d 1196 (5th Cir. 1973) rehearing 494 F.2d 1284 (5th Cir. 1974); *Unites States v. Speed*, 489 F.2d 478 (5th Cir. 1973), rehearing 497 F.2d 546 (5th Cir. 1974); *United States v. McKim*, 487 F.2d 305 (5th Cir. 1973).

analysis of official action occurring prior to the date of that opinion. *United States v. Miller*, 1974, 492 F.2d 37."

The Court qualifies this statement, however, in footnote 2 on page 170, where it states:

"We wish to emphasize in this respect that *Miller* cannot be read as approving every stop and search conducted by border patrol agents within 100 miles of an external boundary prior to June 21, 1973, the date of the opinion in *Almeida-Sanchez*. This Court has explicitly recognized, even before that landmark Supreme Court decision, that Fourth Amendment considerations would necessarily limit the constitutional scope of 8 U.S.C. §1357 and its attendant regulations."[52]

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[52]The following is the balance of the text of note 2 at page 170 in *Unites States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974). "[P]roximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements. We would find it peculiar, for example, if massive searches were permissible in downtown Cleveland or Buffalo on the basis of a 'border search' theory. Therefore, while 'border search' is a convenient phrase to describe a reasonableness standard for searches pursuant to the customs and immigration laws, it is not sufficiently internally descriptive to justify automatically the reasonableness of all searches conducted for customs and immigration purposes within a certain proximity to national borders." *United States v. McDaniel*, 5th Cir. 1972, 463 F.2d 129.

In *Marsh v. United States*, 5th Cir. 1965, 344 F.2d 317, this Court ordered suppression of the fruits of an alleged border search conducted 63 miles from the border, noting that: "[I]f the Government seeks to qualify the action as a geographically 'extended' border search, it must show at least the circumstances known to the officers at the border which reasonably justified

This Fourth Amendment requirement in roving searches as applied prior to *Almeida-Sanchez* can again be seen in *United States v. Daly*, 493 F.2d 395 (5th Cir. 1974). The Court after reviewing the facts concluded ". . . the search met the test of reasonable suspicion; it need not reach the level of a search on probable cause. *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir. 1966), cert denied, 385 U.S. 977, 87 S.Ct. 517, 17 L.Ed. 2d 439; *United States v. Tsoi Kinan Sarg*, 416 F.2d 306 (5th Cir. 1969); *Walker v. United States*, 404 F.2d 900 (5th Cir. 1968)." at 397. The same result was achieved in *United States v. Byrd*, 494 F.2d 1284 (5th Cir. 1974); *United States v. Greene*, 496 F.2d 1317 (5th Cir. 1974); and *United States v. Speed*, 497 F.2d 546 (5th Cir. 1974).

On this basis the Fifth Circuit although contending that *Almeida-Sanchez* does not apply retroactively, would have achieved the same result in the instant case because the search in *Peltier* lacked even the 'reasonable suspicion' required by the Fifth Circuit's application of the Fourth Amendment.

As an aside, with the Fifth Circuit's own recognition that pre-*Almeida-Sanchez* case law required application of the Fourth Amendment to Section 287(a) of the Immigration and Nationality Act 66 Stat. 233, 8 U.S.C. 1357(a) it can hardly be argued that 'clear past precedent allowing roving patrol searches without even a reasonable suspicion' was overturned by the Court's

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the request relayed to officers in the interior. Any other doctrine would render travelers who had recently entered this country subject to almost unlimited arrest and search without any cause save the simple request of a border officer to one at an interior point. In our view this cannot be squared with the test of reasonableness under the Fourth Amendment." 344 F.2d at 325.

decision in *Almeida-Sanchez*. The Circuit Courts primarily affected by the decision in *Almeida-Sanchez*, although through varying rationale, have unanimously and unequivocally determined that any cases pending on appeal at the time of this Court's decision in *Almeida-Sanchez*, where a roving border patrol conducted a search without at least 'reasonable suspicion', must be reversed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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